Supreme Court, U.S.
FILED
JUN 3 1991
OFFICE OF THE CLERK

No. 90-1675

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT REICHELT, PAUL S. JUZWISHEN, ALLEN A. MICHEWICH, FRANK A. MISIEWICZ, WILLIAM J. MUELLER, JOSEPH M. SCAVONE, LINDA A. SHINGARA, JOHN D. SWEENEY, HENRY W. WAJDOWICZ, and CATHERINE PELLETIER, *Petitioners*,

v.

EMHART CORPORATION and USM CORPORATION, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

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Dated: June 3, 1991

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's grant of summary judgment to respondents and correctly held that (1) because under ERISA, welfare benefits such as severance benefits of the type at issue here are not vested, an employer is free to adopt, modify or eliminate such benefits; (2) petitioners are not entitled to severance benefits under the terms of respondents' only applicable severance pay plan; and (3) even if Emhart's ad hoc severance practice constituted an unwritten plan, under such a plan the administrator had discretionary authority to determine eligibility for benefits and it was not arbitrary or capricious to deny petitioners severance benefits under this practice.

PARTIES TO THE PROCEEDINGS

Nine of the petitioners, Robert Reichelt, Paul S. Juzwishen, Allen A. Michewich, Frank A. Misiewicz, William J. Mueller, Joseph M. Scavone, Linda A. Shingara, John D. Sweeney, and Henry W. Wajdowicz, were plaintiffs in individual actions brought in the United States District Court for the District of Connecticut. During pre-trial proceedings, these individual actions were consolidated with each other and later with a certified class action brought by class representative Catherine Pelletier. The nine individual petitioners and class representative Catherine Pelletier were appellants in the court of appeals.

The defendants in the individual actions in the district court, and appellees in the court of appeals, were Emhart Corporation, its wholly-owned subsidiary USM Corporation, and Royal E. Cowles, Emhart's former Vice President for Human Resources. Only USM Corporation was named as a defendant in the class action. Petitioners maintain that Royal E. Cowles is also a respondent to this Petition. However, Cowles was dismissed from this action by the district court. Petitioners did not challenge his dismissal on appeal, and the Court of Appeals did not address the issue of his dismissal. Therefore, Cowles is not a party to these proceedings.

Emhart Corporation is now a wholly-owned subsidiary of Black & Decker Inc., which is a wholly-owned subsidiary of The Black & Decker Corporation. At the time these actions were filed, USM Corporation was a wholly-owned subsidiary of Emhart Corporation. USM Corporation has since changed its name to Emhart Enterprises Corporation and has been merged into Emhart Industries, Inc., which is a wholly-owned subsidiary of Emhart Corporation. Emhart Industries, Inc. has the following non-wholly-owned subsidiaries:

Emhart Investments B.V.
Black & Decker Group Inc.

Emhart Sweden Holdings A.B.
Black & Decker, S.A. de C.V.
Nippon Pop Rivets & Fasteners Ltd.
Trallfa True Temper (Malaysia) Sdn. Bhd.
Black & Decker Canada (1989) Inc.
Black & Decker GmbH
DOM Sicherheitstechnik GmbH & Co. KG
Tucker GmbH
Emhart Asia Limited
Black & Decker (Norge) A/S
Empire Insurance Limited
Emhart Pension Company Limited
Emhart Zurich S.A.

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Respondents.

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents Emhart Corporation and USM Corporation respectfully request that the Court deny the Petition for Writ of Certiorari in this matter, seeking review of the decision and judgment of the United States Court of Appeals for the Second Circuit entered on December 11, 1990, and its denial of the Petition for Rehearing entered on February 1, 1991.

COUNTERSTATEMENT OF THE CASE

Petitioners are all former salaried employees of the Ansonia, Connecticut plant of what used to be the Farrel Division of USM Corporation ("USM"), which was, prior to the sales at issue, a wholly-owned subsidiary of Emhart Corporation ("Emhart"). [A2]. Petitioners claim they are entitled to severance pay as a result of the sales of Farrel's roll shop and machine shop, even though they continued in their employment with the purchasers of the Farrel roll and machine shops, in essentially the same positions, at the same salaries and with substantially the same benefits.[1] [A17-A18].

Petitioner Reichelt's claim was initially filed in state court in Connecticut alleging a breach of contract. The suit was removed to federal court and Reichelt subsequently amended his complaint to assert a claim under ERISA. The complaints of the remaining individual petitioners followed and were consolidated with Reichelt's complaint. The class action, also filed in federal court in Connecticut, was later consolidated with the other complaints in this matter. All state law causes of action were dismissed by the district court. In February 1990, the district court granted respondents' summary judgment motion, dismissed Cowles as a defendant, and denied petitioners' cross-motion for summary judgment.[2] On December 11, 1990, the United States Court of Appeals for the Second Circuit affirmed the decision of the district court and, on February 1, 1991, the Second Circuit denied petitioners' Petition for Rehearing.

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[1] Petitioners retained all of their vested ERISA benefits, such as pension benefits, and most of their welfare benefits, such as health insurance. Employees who were permanently laid off within a certain time after the sale (none of petitioners were among this group) also received severance benefits pursuant to the SUB Plans. [A6].

[2] A page of the district court's unpublished opinion, which is page A22 of petitioners' appendix, mistakenly reproduced part of a block quotation in the district court's opinion as a footnote. This page is reprinted as page RA1 of Respondents' Appendix.

In summarizing the facts for review, it is important to note that petitioners do not contend that the courts below erroneously relied on any disputed facts. Rather, petitioners argue that the courts below chose to ignore as immaterial to their decisions certain undisputed facts.[3] The undisputed material facts, as relied on by the courts below, are as follows.

From 1968 until May 1986, Farrel was a division of USM, and from 1976 USM was a wholly-owned subsidiary of Emhart. At the time that USM Corporation acquired the previously independent Farrel Corporation in 1968, no severance pay was paid to the employees of Farrel Corporation by either Farrel Corporation or USM Corporation. In 1976, when USM was in turn acquired by Emhart Corporation, no severance pay was paid to employees of the Farrel roll and machine shops by either USM or Emhart. [A4; A15-A16].

Sometime in 1980, Emhart began to consider the adoption of a uniform severance pay plan for all of its subsidiaries and divisions. In December 1981, Emhart decided that instead of adopting a uniform severance pay plan, it would eliminate all existing severance pay plans, policies and practices and thereafter would consider granting severance pay on an *ad hoc* basis. Thereafter, if division management thought that an employee should be given severance pay because of the circumstances of

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[3] In their statement of the case, petitioners refer to many alleged undisputed facts without record citation. Although most of these factual issues are indeed not in dispute, petitioners have failed to reproduce the necessary portions of the record in their appendix. Pursuant to Supreme Court Rule 15, respondents note throughout this brief those facts which they and the courts below agree are material, with citations to the Second Circuit's and district court's reliance on those facts. Additionally, respondents specifically contest petitioners' statement that the amount at issue in this case is $4 million. [Petition for a Writ of Certiorari at p. 3]. This amount is nowhere of record, and was never put in issue with the district court.

his or her termination, the division management would make a recommendation to the Vice President for Human Resources, who had the discretion to decide whether to grant any severance pay and to determine the amount, if any, to be granted. This policy became effective January 1, 1982 and was announced by a memorandum from Sherman Carpenter, Emhart's Vice President for Administration. [A16-A17].

Between December 17, 1981 and May 1986, Emhart, including its Farrel division, adhered to the procedure set forth in Carpenter's memorandum. Recommendations for severance pay were made by group and division management within Emhart to Royal Cowles, the Vice President of Human Resources, who had the discretion to approve the granting of severance pay. [A11-A12]. Between December 17, 1981 and May 1986, Cowles approved severance pay for twenty-nine salaried employees, nineteen of whom received one week's pay for each year of service, six of whom received more than one week's pay for each year of service, and four of whom received less. [A5]. Between 1982 and 1986, Emhart sold many of its divisions and subsidiaries. In these situations, Emhart's consistent practice was not to pay severance pay to employees who continued their employment with the purchaser. In cases where Emhart decided to pay severance to a group of employees who would lose their jobs as a result of a plant closing or sale of a portion of its business, Emhart's practice was to adopt a formal, written ERISA plan to cover those employees. [A5-A6].

In May 1986, Emhart sold the Ansonia plant of USM Corporation's Farrel Division in two separate transactions. The roll shop was sold to SHW Corporation and the machine shop was sold to a newly-formed Farrel Corporation. On May 2, 1986, roll shop employees met with Farrel executives. At that meeting, the sale was announced. Ken Irish, Director of Human Resources for Farrel, specifically stated that Farrel employees who

were offered employment with SHW would not be given severance pay. All of the individual petitioners accepted employment with SHW Corporation in essentially the same jobs and at the same salary they had been receiving previously. All continued their employment with the purchaser beginning the following week, in the same jobs, at the same salaries and with substantially the same benefits. [A17-A18]. The machine shop was sold to the newly-formed Farrel Corporation on May 12, 1986. Employees who went to work for the purchaser were told that they would not receive severance pay unless they were laid off later that year. The machine shop employees continued their employment with Farrel Corporation in the same jobs on that date, also at the same salaries and with substantially the same benefits. [A17-A18].

On May 12, 1986, Emhart adopted two ERISA welfare benefit plans to provide supplemental unemployment benefits to employees of the Farrel roll shop and machine shop who were permanently laid off after February 1, 1986 and not offered jobs with the purchasers or who were permanently laid off by the buyer after the sale during 1986. [A3-A4; A6; A18]. These Supplemental Unemployment Benefit Plans ("SUB Plans") specifically provided that employees who accepted or were offered a job with the purchaser and not subsequently permanently laid off during 1986 would not be eligible for any benefits. The supplemental unemployment benefit under the SUB Plans was one week's pay for each year of service, reduced by any notice pay. Employees who quit, retired or were discharged for cause were not eligible for the benefit. [A6]. As the district court below specifically noted, the limitations paragraphs of the SUB Plans specifically made the Plans applicable to employees in petitioners' situation by providing, "any employee who accepts a job with [the purchaser] is also not eligible for supplemental unemployment benefits. Any employee who does not accept an offer of a job with [the purchaser] is also not

eligible for supplemental unemployment benefits," unless an employee was permanently laid off within a certain time after the sale. [A18].

SUMMARY OF REASONS FOR DENYING THE WRIT

The courts below correctly decided that, because under ERISA severance benefits of the nature involved here are unvested welfare benefits, Emhart was free to adopt the SUB Plans to apply to the Farrel sales, notwithstanding any prior severance practice or plan. The United States Supreme Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), does not affect an employer's unfettered ability to modify or terminate ERISA welfare benefits. As the courts below found, the SUB Plans are the only ERISA plans which govern the question of petitioners' entitlement to severance benefits at the time of the Farrel sales, and the SUB Plans clearly provide that petitioners are not entitled to such benefits.

The Second Circuit also correctly decided in the alternative that even if benefit eligibility were to be determined under the past severance pay practice, which petitioners allege existed at Emhart and constituted an ERISA plan, that practice gave complete discretion to Emhart to decide under what circumstances severance benefits would be paid. Thus, in accord with the Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, the Second Circuit decided that any decision to grant or deny severance pay under this alleged practice should be reviewed according to an arbitrary and capricious standard. Under this standard, the Second Circuit correctly held that petitioners would not be entitled to benefits.

REASONS FOR DENYING THE WRIT

I. THE COURTS OF APPEALS ARE IN AGREEMENT THAT UNDER ERISA, SEVERANCE BENEFITS OF THE TYPE INVOLVED HERE ARE NOT VESTED, AND AN EMPLOYER IS FREE TO ADOPT, MODIFY OR ELIMINATE SEVERANCE BENEFIT PLANS.

The decisions of the court below are in accord with all of the five other federal appellate courts which have considered the issue, holding that, because under ERISA severance benefits of the type involved here are not vested, an employer is free to change such benefits at any time. This Court has repeatedly declined to review such decisions.

According to petitioners, under the pre-ERISA common law of contracts, an employer would not be allowed to "take away" severance benefits once such benefits had been promised to and "earned" by an employee. Petitioners cite numerous state court severance pay cases decided, mostly prior to ERISA's enactment, under a common law contract analysis, to argue that, prior to ERISA's enactment, employees had a vested right to severance pay, which they had earned by virtue of their years of service with an employer. Petitioners further argue that the Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), restores common law contract analysis to the determination of severance benefit entitlement under ERISA. This is simply not the case. As every one of the courts of appeals considering the issue has held, ERISA has quite plainly changed the common law as it applies to severance benefits, such as those claimed in this case, making such benefits unvested. Further, *Firestone* simply does not address the question of when an employer may modify or eliminate unvested benefits.

The severance pay at issue in this case is a welfare benefit under ERISA,[4] *Gilbert v. Burlington Indus., Inc.*,

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[4] *See* 29 C.F.R. § 2510.3-2(b) (1990). This ERISA regulation provides that a severance pay plan is *not* a pension plan under

765 F.2d 320, 325 (2d Cir. 1985), *aff'd*, 477 U.S. 901 (1986), and welfare benefits are unvested, contingent rights, which may be altered unilaterally by an employer at any time. *Young v. Standard Oil (Indiana)*, 849 F.2d 1039, 1045 (7th Cir.), *cert. denied*, 488 U.S 981 (1988). ERISA expressly defines which types of benefits are vested benefits, which may not be altered once they have vested. These are only benefits such as retirement or pension payments, not those benefits covered by welfare benefit plans. 29 U.S.C. § 1051; *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987).

As the appellate courts have consistently held, under ERISA employers owe a duty to employees with respect to amending plans only where employees have vested rights, as they do in pension or retirement benefits for which contributions have been made by an employee or on an employee's behalf on a continuing basis. *Young v. Standard Oil*, 849 F.2d at 1045. However, in the case of unvested, contingent benefits, such as those represented by an employee welfare benefit plan like a severance pay plan, the courts of appeals have consistently held that the employer is free to amend the plan at any time, for any purpose, even without notice to employees, and the Court has consistently declined to review such decisions.

The Second Circuit, in accord with the district court in this matter, found that Congress structured ERISA so as to give employers "considerable flexibility with respect to welfare plans." [A8]. As the Second Circuit said:

ERISA so long as (1) the payments are not contingent on the employee's retiring, (2) the total amount of such payments does not exceed twice the employee's annual compensation, and (3) the payments are completed within 24 months after the employee's termination. This regulation is reprinted in Respondents' Appendix at RA2-RA3.

> Since severance benefits are welfare benefits and an employee's interest in a welfare benefit plan is not vested, the employer has no continuing obligation to provide severance benefits; under ERISA, the employer has the right at any time to amend or terminate a severance pay plan.

(A9, citing and relying on *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir.), *cert. denied*, 111 S. Ct. 517 (1990); *Young v. Standard Oil (Indiana)*, 849 F.2d 1039, 1045 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988); *Sutton v. Weirton Steel*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984); and *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987)).

In *Adams v. Avondale Indus., Inc.*, 905 F.2d 943 (6th Cir.), *cert. denied*, 111 S. Ct. 517 (1990), the Sixth Circuit held that an employer had the right to amend a severance plan immediately before a sale to preclude payment of benefits to employees affected by the sale. As in this case, in *Adams*, the employer, Avondale, maintained an unwritten policy of providing salaried employees who were involuntarily terminated with severance benefits. Less than two weeks before the sale of one of its divisions, Avondale distributed a written severance plan to some, but not all, of the employees who would be affected by the sale. The written plan provided that severance benefits would not be paid to employees who continued to work for the purchaser.

Following the line of cases relied on by the Second Circuit and the district court, which hold that welfare benefit plans may be amended by an employer at any time, the Sixth Circuit held that the employer had the right to adopt its new plan:

> In drawing the line between employer actions subject to the fiduciary duty requirement and those not, we must avoid any rule that would have the effect of

> undermining Congress' considered decision that welfare benefit plans not be subject to a vesting requirement. We are compelled, therefore, to reject plaintiffs' proposed rule that welfare benefit plans such as the one before us be amended or terminated only when such action would be in the best interests of the employees. To adopt such a requirement would, in effect, accord employees a vested right to welfare benefits, thereby upsetting ERISA's delicate balance in this area. Instead, we employ the rule . . . that a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan. *In so doing, we join the majority of circuits that have already ruled on this issue.*

Adams v. Avondale, 905 F.2d at 947 (citations omitted, emphasis added). The Sixth Circuit specifically held:

> Finally, we note that nothing in the Supreme Court's recent decision in [*Firestone Tire & Rubber Co. v. Bruch*] implies the invalidity of the case law excluding amendments of welfare benefit plans from scrutiny under ERISA's fiduciary duty requirements . . . The Supreme Court's holding in *Bruch* was explicitly "limited to the appropriate standard of review in § 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations."

Adams v. Avondale, 905 F.2d at 950 (citations omitted).

In *Sejman v. Warner-Lambert Co.*, 889 F.2d 1346 (4th Cir. 1989), *cert. denied*, 111 S. Ct. 43 (1990), the case primarily relied on by the district court below in deciding the parties' summary judgment motions, the Fourth Circuit reached the same conclusion in another factually similar situation. In *Sejman*, the employer interpreted its severance policy, which did not have an express exclusion for sale situations, to provide that employees who continued to work for a purchaser in the same jobs and with similar salaries and benefits, were not eligible for severance pay.

According to the Fourth Circuit:

> Because, under ERISA, severance benefits are contingent and unaccrued, an employer may unilaterally amend or eliminate the provisions of a severance plan, which is usually funded solely by the employer in any event . . . Nothing in ERISA thus required Warner-Lambert to pay plaintiffs at 1981 benefit levels or to provide continuing coverage for them under its severance policy. Plaintiffs' interest in the severance plan did not vest simply because they once were covered by it.

Sejman v. Warner-Lambert, 889 F.2d at 1348-49 (citation omitted). *See also Bruning v. Mrs. Smith's Frozen Food Co.*, 894 F.2d 401 (4th Cir. 1989) (text in Westlaw) ("employees have no 'right' to these [severance] benefits and employers have no continuing obligation to provide them."); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1159-60 (3d Cir. 1990) (welfare benefit plans are exempted from vesting requirements; such benefits may be eliminated by employer without violating duty to employees because decision to eliminate is a plan creation or design decision, not a plan administration decision).[5]

Likewise, in *Young v. Standard Oil, supra*, the employer decided to divest itself of a particular division, and negotiated to sell the division. It became clear during the negotiations that while the purchaser would offer the employees employment, it would not be comparable to their employment with Standard Oil. Under those circumstances, the employees would be entitled to benefits under Standard Oil's existing severance pay plan. *Spe-*

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[5] Petitioners imply that the court's decision in *Hozier* says that a welfare benefit plan cannot be unilaterally amended without express reservation of the power to do so. This is not the case. The court in *Hozier* specifically declined to reach this issue. Rather, it only decided that ERISA prohibits oral amendments to written plans. 908 F.2d at 1163 & n.9.

cifically to avoid paying severance benefits, Standard Oil amended its severance pay plan to provide that employees who received *any* offer of employment from a purchaser, whether comparable employment or not, would not be eligible for severance pay. Employees were not told of the change in the policy until at least one month *after* the sale, after they had to decide whether or not to accept employment with the purchaser. The Seventh Circuit decided that this change in Standard Oil's severance plan did not violate ERISA. The court specifically held:

> An employer may . . . unilaterally amend or eliminate a severance plan without violating ERISA. . . . This is so because an employer is permitted to act in a dual capacity as both the manager of its business and a fiduciary with respect to unaccrued benefits. An employer is therefore, free to alter or eliminate severance benefits (which are usually solely funded by the employer) without consideration of the employees' interests. . . . In short, an employer does not owe its employees a fiduciary duty when it amends or abolishes a severance benefit plan.

849 F.2d at 1045 (citations omitted).

The Seventh Circuit in *Young* relied on the distinction in ERISA between welfare benefit plans and pension benefit plans. The court noted that ERISA imposes stringent accrual, vesting and funding requirements on pension plans, but not on welfare plans. Because the severance pay plans at issue were welfare benefit plans, they were not subject to ERISA's more stringent requirements. 849 F.2d at 1045.

The Seventh Circuit in *Young* relied on the reasoning of the Fourth Circuit in *Sutton v. Weirton Steel*, 724 F. 2d 406, 410-12 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984). In *Sutton*, prior to selling a steel mill, the employer amended its severance pay plan to provide specifically that the sale would not trigger the payment of severance. The employees challenged this change. The

Fourth Circuit held that the employer did not violate any fiduciary duty to employees by unilaterally altering either unfunded, contingent retirement benefits or severance benefits.

The same conclusion was also reached by the Eleventh Circuit, which held that where contingent, non-vested benefits under ERISA, such as severance pay benefits, are affected by the sale of a business, "ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued." *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987). *Phillips* involved the claims of former Amoco employees, who were re-employed by a purchaser of part of Amoco's business, under Amoco's retirement plan. The Eleventh Circuit held that:

> [T]he fiduciary provisions of ERISA are not implicated in the sale of a business merely because the terms of the sale will affect contingent and non-vested future retirement benefits. This holding is supported by the fact that ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued. Moreover, the ERISA scheme envisions that employers will act in a dual capacity as both fiduciary to the plan and as employer. ERISA does not prohibit an employer from acting in accordance with its interests as employer [by altering these benefits as part of the terms of a sale] when not administering the plan or investing its assets.

799 F.2d at 1471 (citing *Sutton v. Weirton Steel*, *supra*, 724 F.2d 406 (4th Cir. 1983)).

The courts below correctly relied on this uncontroverted line of cases in holding that Emhart had the right to adopt the SUB Plans, which provided that severance benefits would be paid as a result of the sales only in certain limited circumstances. Severance benefits are neither vested nor accrued and thus, according to the

consistent decisions of the federal appellate courts, which the Court has consistently declined to review, Emhart was free to adopt a new plan or to alter any practice it had relating to severance benefits, at any time.

II. THE COURTS BELOW CORRECTLY DECIDED THAT THE SUB PLANS GOVERNED THE QUESTION OF PETITIONERS' ENTITLEMENT TO SEVERANCE PAY, THAT PETITIONERS WERE NOT ENTITLED TO BENEFITS UNDER THESE PLANS, AND THAT PETITIONERS WOULD NOT HAVE BEEN ENTITLED TO BENEFITS UNDER ANY PAST PRACTICE.

Petitioners argue that, because the SUB Plans do not expressly revoke the *ad hoc* practice which petitioners claim existed and constituted a severance pay plan, they therefore remained eligible for severance pay under Emhart's alleged past practice. However, as the courts below found, (1) the SUB Plans were specifically designed to deal with the Farrel sales in question, (2) petitioners were covered by the express terms of the Plans, and (3) they therefore are not entitled to severance benefits.

As the Second Circuit noted, accepting petitioners' argument would lead to a completely incongruous result. According to petitioners' theory, all of the individuals entitled to benefits under the SUB Plans would also have been entitled, as a result of the sale itself, to benefits under the severance practice which petitioners allege existed. Thus, they would have received double severance benefits. Such a result was never intended, and would have resulted in a windfall to these employees. Even petitioners have not argued that any employee should have received a double severance benefit, but they ignore the fact that such a result is compelled by their theory. The SUB Plans applied to petitioners and were the only plans governing their entitlement to severance pay.

Even if the applicability of the SUB Plans, and petitioners' ineligibility for benefits under those Plans, were

not obvious, the Second Circuit reviewed the undisputed facts in this matter, and decided that petitioners were not entitled to severance pay under the practice which petitioners allege existed. The Second Circuit decided that Emhart's policy of giving its Vice President for Human Resources the authority to determine severance pay awards when he received recommendations for such payments constituted a grant of discretion. Therefore, even if Emhart's alleged practice of paying severance benefits in certain situations amounted to an ERISA plan, the Second Circuit held that, under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. at 115, determinations of eligibility for severance benefits in accordance with that practice should be reviewed under an arbitrary and capricious standard. The Second Circuit decided, upon a review of the undisputed facts existing in this matter, that a denial of severance benefits to petitioners would not have been arbitrary or capricious. [A11-A12].

Because the federal appellate courts have uniformly and correctly decided that under ERISA employers have the right to adopt, modify or eliminate unvested welfare benefits, and because the Second Circuit's decision was in accord with this correct line of decisions, it is unnecessary for the Court to reach the issue of the interpretation of benefit eligibility under this alleged practice. However, the Second Circuit also conducted the review of the factual record necessary to determine that petitioners were not eligible for benefits under the practice they allege existed. It is not necessary for the Court to repeat this factual review to confirm the correctness of the Second Circuit's alternative holding.

III. PETITIONERS ARE INCORRECT THAT *FIRESTONE v. BRUCH* MANDATES THE APPLICATION OF THE STATE COMMON LAW OF CONTRACTS, OR OF A *DE NOVO* STANDARD OF REVIEW, TO THE INTERPRETATION OF ERISA WELFARE BENEFIT PLANS.

In a confused and scatter-shot argument, petitioners attempt to convince the Court that the effect of its decision in *Firestone Tire & Rubber Co. v. Bruch, supra,* was to reinstate a state common law contract analysis to the determination of both procedural and substantive issues regarding welfare benefit plans. The Court could and should deny *certiorari* on this petition *sua sponte* based on Supreme Court Rule 14.5, which provides, "[t]he failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition." Further, petitioners' argument, if accepted on its merits, would completely unsettle ERISA's preemption of state law with respect to the unvested nature of welfare benefits. Instead, it would make these benefits subject to the vagaries of a state-by-state application of common law contract interpretation. This is exactly what Congress intended to avoid when it enacted ERISA to provide for a uniform national policy of employee benefits. *See* 29 U.S.C. § 1001.

Petitioners are also incorrect in arguing that the *Firestone* decision mandates a *de novo* standard of reviewing employee benefit plans. First, *Firestone* applies only to the question of the standard to be used to review an administrator's determination of benefit eligibility under a plan. [A23, citing *Firestone*, 109 S. Ct. at 956]. As the district court said, *Firestone* simply did not hold that severance plans are not welfare benefits and as such cannot be modified at the employer's discretion. [A23]. As the district court pointed out, if *Firestone* stood for

that proposition, it would have effectively overruled the Court's decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 18 (1987), which adopted the Second Circuit's holding in *Gilbert v. Burlington Indus.*, 765 F.2d 320 (2d Cir. 1985), *aff'd*, 477 U.S. 901 (1986), that severance benefits are welfare benefits under ERISA. This Court's decision in *Firestone* did not affect the unvested nature of welfare benefits, nor did it upset the line of cases holding that such benefits may be changed at any time.

CONCLUSION

Because the decisions of the courts below are in accord with the uniform decisions of other federal appellate courts that severance benefits are unvested welfare benefits which may be modified or eliminated at any time, and because the courts below correctly decided that petitioners were not entitled to severance benefits under any applicable plan, respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: June 3, 1991

RESPONDENTS' APPENDIX

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Similarly, in *Phillips, supra*, defendant Amoco sold its liquid propane gas operations to a buyer which did not credit employees' years of service with Amoco towards their retirement benefits. 799 F.2d at 1466-67. The employees brought suit against Amoco and the buyer, claiming that under ERISA the bargaining away of their years of service with Amoco constituted a breach of fiduciary duty.[2] The eleventh circuit disagreed:

> The district court held that the fiduciary provisions of ERISA are not implicated in the sale of a business merely because the terms of the sale will affect contingent and non-vested future retirement benefits. This holding is supported by the fact that ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued.

Id. at 1471.

Plaintiffs have expended substantial energy in attempting to establish the existence and terms of an Emhart severance policy. They argue that even if a written plan was not formally adopted,

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(Footnote 1 continued)

Here, the plaintiffs claimed severance immediately. In both cases, however, the plaintiffs were terminated and claimed that this event triggered a severance payment from their original employer. The question of law in both cases, therefore, is whether the employers have the right under ERISA to deny severance to terminated employees assured of job continuity with a new owner.

[2] 29 U.S.C. § 1104(a)(1) provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries. . . ." A person is a fiduciary with respect to a retirement plan where, *inter alia*, he "exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . [or] has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A).

§ 2510.3-2 Employee pension benefit plan.

(a) *General.* This section clarifies the limits of the defined terms "employee pension benefit plan" and "pension plan" for purposes of Title I of the Act and this chapter by identifying certain specific plans, funds and programs which do not constitute employee pension benefit plans for those purposes. To the extent that these plans, funds and programs constitute employee welfare benefit plans within the meaning of section 3(1) of the Act and § 2510.3-1 of this part, they will be covered under Title I; however, they will not be subject to parts 2 and 3 of Title I of the Act.

(b) *Severance pay plans.* (1) For purposes of Title I of the Act and this chapter, an arrangement shall not be deemed to constitute an employee pension benefit plan or pension plan solely by reason of the payment of severance benefits on account of the termination of an employee's service, provided that:

(i) Such payments are not contingent, directly or indirectly, upon the employee's retiring;

(ii) The total amount of such payments does not exceed the equivalent of twice the employee's annual compensation during the year immediately preceding the termination of his service; and

(iii) All such payments to any employee are completed,

(A) In the case of an employee whose service is terminated in connection with a limited program of terminations, within the later of 24 months after the termination of the employee's service, or 24 months after the employee reaches normal retirement age; and

(B) In the case of all other employees, within 24 months after the termination of the employee's service.

(2) For purposes of this paragraph (b),

(i) "Annual compensation" means the total of all compensation, including wages, salary, and any other benefit of monetary value, whether paid in the form of cash or otherwise, which was paid as consideration for the employee's service during the year, or which would have been so paid at the employee's usual rate of compensation if the employee had worked a full year.

(ii) "Limited program of terminations" means a program of terminations:

(A) Which, when begun, was scheduled to be completed upon a date certain or upon the occurrence of one or more specified events;

(B) Under which the number, percentage or class or classes of employees whose services are to be terminated is specified in advance; and

(C) Which is described in a written document which is available to the Secretary upon request, and which contains information sufficient to demonstrate that the conditions set forth in paragraph (b)(2)(ii)(A) and (B) of this section have been met.

* * * *